

**Q and A Response to Public Comment Received on
Upper Missouri River Breaks Draft Compact**

- 1. If the BLM is subordinating to uses in existence as of June 1, 2012, why is the 2001 priority date in the compact at all? How do I know that the subordination provision will be honored by the BLM?**

The U.S. Supreme Court determined in *Winters v. United States* that the priority date of a federal reserved water right is the date on which the document establishing the federal reservation was executed. In order to ensure that a compacted water right is recognized as having all of the characteristics of a federal reserved right, it is important that the priority date be recorded as the date of the reservation, in this case January 17, 2001.

Nothing in state or federal law, however, prevents the federal government from entering into a legally binding agreement to subordinate its priority date to uses that arose after the federal reservation was established. The state of Montana requests this concession from the federal entities with which it negotiates compacts in order to protect state-based water rights existing at the time the compact is negotiated. Acknowledging that subordination represents a substantial concession on the part of the Federal Government, the State agrees to recognize the original priority date in the compact. The Commission has successfully negotiated, and the Montana Legislature has ratified, sixteen water rights compacts. Of these, thirteen contained a subordination provision. No federal agency or Indian tribe has attempted to invoke the original priority date for any of these compacts. The right decreed by the Montana Water Court will state both the original priority date and the "enforceable" priority date for purposes of enforcement and permitting.

Multiple legal protections exist to ensure that the subordinated, or "enforceable" priority date is observed by the Federal Government. First, each compact contains a finality clause providing that once a compact is ratified, all provisions are binding on both parties; neither party may unilaterally modify the compact without the other party's consent, and *any attempt* to unilaterally modify the compact by one party shall render the entire compact voidable by the other party. This means that if the United States were to attempt to reinstate the original priority date as the enforceable priority date, the State would have the ability to nullify the entire compact, leaving the BLM without a quantified right for the Monument.

Once the compact has been ratified by the Montana legislature and approved by the parties, it must be decreed by the Montana Water Court. A Water Court decree adds a second layer of protection for the subordination provision because it is a final judgment binding on both parties and recognized by all other state and federal courts. Modification of a final decree requires an arduous legal process and carries no certainty of success. As explained above, any attempt by the United States to retroactively institute the original date of reservation as the enforceable priority date would almost certainly void the compact, leaving the United States without a decreed water right.

- 2. Will I be forced to release water from my reservoir or pond when instream flow levels fall below 5 cfs on Arrow Creek or 160 cfs on the Judith River?**

No. So long as the water was diverted and impounded when there was sufficient water to meet the instream flow requirements in the Judith River or Arrow Creek, the BLM cannot make a call. Water stored validly within the priority system cannot be called at a later date when the project is not diverting or storing.

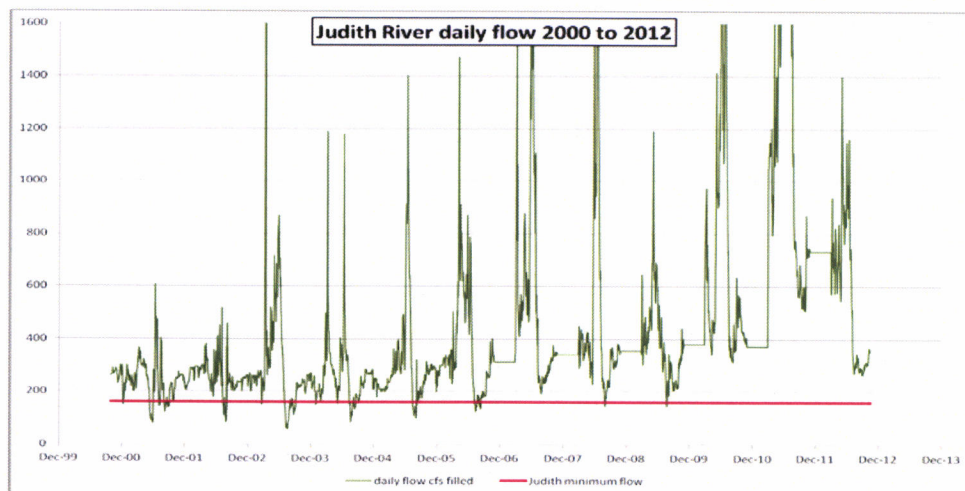
3. How often does the Judith fall below 160 cfs , which could trigger a call by the BLM on rights with a priority date after June 1, 2012?

A USGS operated stream gage has been in place on the lower Judith River since 2000. The average daily discharge during the entire period since installation of the gage has remained well above 160cfs. During the drought years of 2001 to 2006, flow on the Judith dropped below 160 cfs periodically:

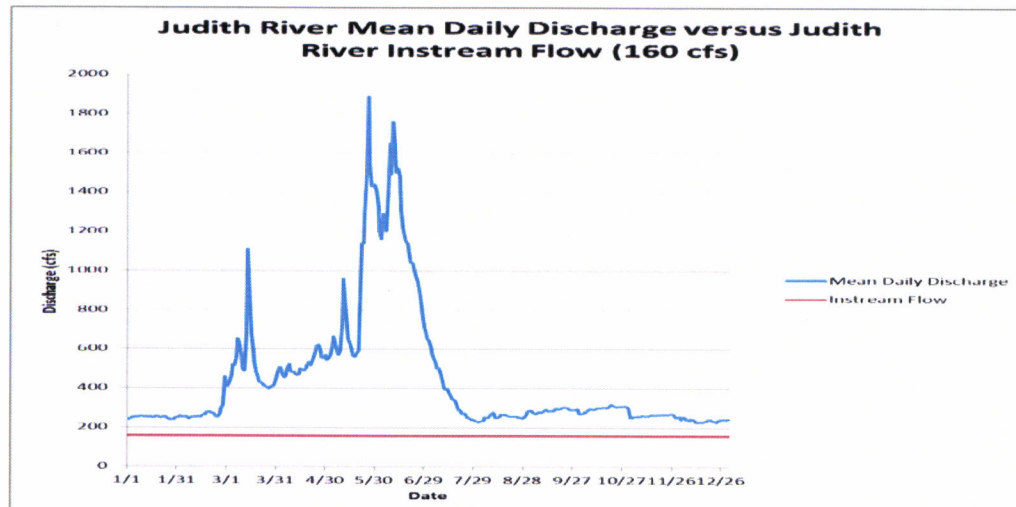
Year	Days <160cfs
2001	53 days
2002	22 days
2003	59 days
2004	34 days
2005	26 days
2006	24 days

Flows below 160 cfs during this time period most often occurred intermittently, rather than on consecutive days. The following graph shows daily streamflow records on the Judith for the period of record, late 2000 to present. The red line indicates the 1985 DFWP instream reservation for 160 cfs. Note that the daily flow fell below 160 cfs, especially during the drought years of the early 2000's, which incidentally were part of the driest decade since the 1930's. From 2007 through 2012, the Judith only dropped below 160 cfs a total of five days.

It is important to remember that all existing water use is reflected in these measurements and the BLM's instream right will be junior to all water rights issued before June 1, 2012. No existing rights with a priority date senior to June 1, 2012 will be callable to meet the BLM right.



The next graph shows the daily flows averaged for each day of the year for the period of record (source: Krause 2012). Notice that the daily flows, when averaged, remain well above the 160 cfs threshold.



The average annual yield of the Judith River since 2001 is 324,300 acre feet. The 160 cfs instream flow represents 115,800 acre feet, or 36% of the annual yield.

4. Doesn't giving the BLM a base flow of 160 cfs on the Judith all year round mean that a lot of water that could be developed for other beneficial uses will just be sent down stream and into the Missouri?

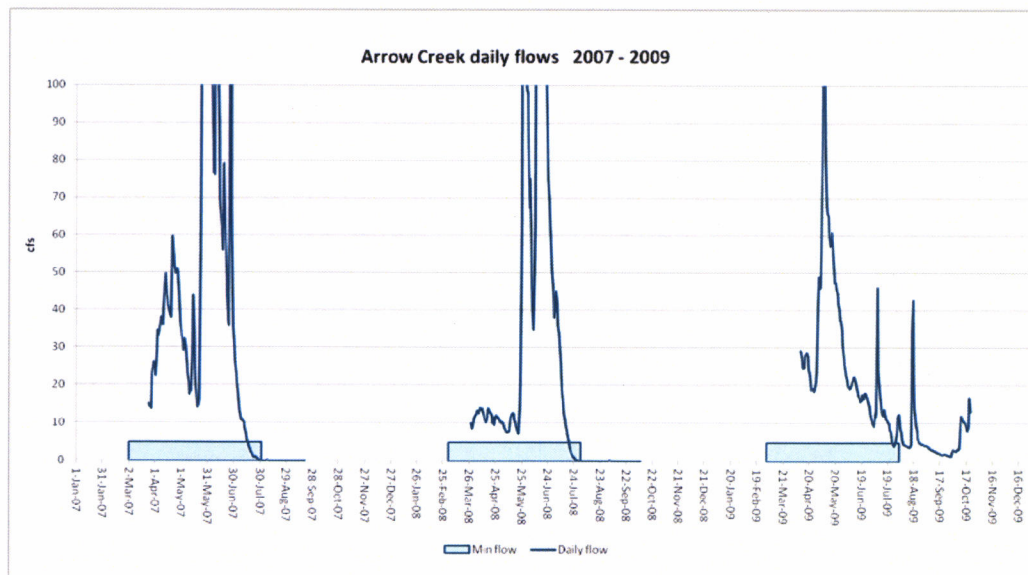
No. Because of the DFWP in-stream flow right, the 160 cfs is not legally available for development regardless of whether the BLM has a parallel right. As the hydrograph above shows, flows on the Judith are usually well above 160 cfs, and those flows are potentially available for appropriation.

5. 160 CFS is more than enough water to irrigate 30 acres of cottonwoods—why is this flow rate necessary when only 5 cfs is necessary on Arrow Creek?

As documented in the BLM technical report accompanying the proposal (available at <http://dnrc.mt.gov/rwrcc/Compacts/UpperMissouriBreaks/BLMtechnical.pdf>), the purpose of the instream flow rights in both the Judith River and Arrow Creek is not to irrigate cottonwoods but to maintain the shallow groundwater level necessary for cottonwood survival. Watershed characteristics affect how cottonwoods are established and adapt to water table levels. The amount of flow in the stream channel necessary to maintain the groundwater table also varies according to watershed size and soil type. Based on these factors, the instream flow amount in both the Judith River and Arrow Creek were set at the levels necessary to maintain minimum historic alluvial groundwater tables that support the Monument ecosystem, not the amounts necessary to "irrigate" 30 acres of cottonwood trees.

6. How often does Arrow Creek fall below 5 cfs between March 1 and July 30, which could trigger a call from the BLM?

The flow in Arrow Creek does drop below 5 cfs from time to time during the period from March 1 to July 30. It is not possible to determine exactly how often Arrow Creek drops below 5 cfs because there is no permanent gaging station in operation on Arrow Creek. However, the BLM began evaluating flows in 2005 and a temporary gage was operated by BLM to monitor flows continuously during the years 2007 through 2009. (The temporary gage was later destroyed by high flows.) Flows on Arrow Creek during 2007 and 2009 dropped below 5 cfs in mid to late July:



Five cfs represents the minimal base flow necessary to maintain the alluvial groundwater table in the Arrow Creek drainage. It is important to remember that all existing water use is reflected in these measurements and the BLM's instream right will be junior to all water rights issued before June 1, 2012. No existing rights with a priority date senior to June 1, 2012 will be callable to meet the BLM right.

7. Why can't Arrow Creek be given a shorter period of use? It often dries up before July 31.

As stated above and documented in the BLM technical science report, (available at: <http://dnrc.mt.gov/rwrcc/Compacts/UpperMissouriBreaks/BLMtechnical.pdf>), the purpose of the instream base flow is to maintain the shallow groundwater table. July is a critical month for cottonwood survival because this is the time period when streamflow is on the receding limb of the hydrograph, which is when new cottonwood seedlings are established. Second, July is when riparian forest evapotranspiration rates are highest and maintaining groundwater is crucial. In an ideal world, it would be great if the instream flow for Arrow Creek was year round. However, given that some years Arrow Creek is dry in late summer, it would be difficult to prove physical water availability for this period. As

already noted, there are some years where the 5cfs will be available through July. While Arrow Creek does dry up entirely during some years, there are a number of years when it does not dry up before August, if at all. From 2007 to 2012, the flow in Arrow Creek lasted until at least the end of July.

8. Why is it necessary to have a year-round period of use for the Judith River and not Arrow Creek?

The Judith River is a perennial stream, and Arrow Creek is an intermittent stream. The basis of the proposal is to maintain groundwater levels that currently exist on both drainages. The riparian forest on the Judith River is adapted to and survives on the historic groundwater level that in turn is determined by river flow elevation, timing, and the location of cottonwood roots. The basis for the instream flow quantifications and periods of use on the Judith River and Arrow Creek are well documented in the BLM's technical report supporting the proposal.

9. Why can't the water right be quantified as a volume (in acre-feet) rather than a flow rate (in CFS)?

The instream flow rights on the Judith River and Arrow Creek do not represent a consumptive use of water. The Compact does not seek to irrigate cottonwoods the way a rancher would irrigate an alfalfa field. The instream flow rights are based on protecting the flow conditions that will maintain shallow groundwater levels and allow for propagation and survival of riparian forest in the future. This concept is most accurately expressed in terms of flow rate, because it is the factor that determines the groundwater level.

10. How will the compact affect my ability to build stock-ponds/pits in the future?

The only restrictions in the compact on new impoundments are that no mainstem impoundments 15 acre feet (AF) or larger may be built on the mainstem of the Judith River or Arrow Creek after the effective date of the compact. What this means is that impoundments smaller than 15 acre feet per year will continue to be allowed under the exception to the permitting requirements of the Montana Water Use Act anywhere in the compact area. An application (Form 605) for a Completed Stockwater Pit or Reservoir is required, as is the case elsewhere in Montana. Larger impoundments will require a permit from the DNRC, as they currently do, and will be allowed on-stream for all tributaries of the Judith River or Arrow Creek. Diversions from the Judith River or Arrow Creek to an off-stream impoundment 15 AF or larger will also continue to be allowed with a DNRC permit and with some restrictions on the rate of the initial diversion, depending on the capacity of the diversion works.

11. I think the designation of the monument was illegal—how can the Commission negotiate a water right for it?

The Commission was created by the Montana Legislature in 1979 to "conclude compacts for the equitable division and apportionment of waters between the State and its

people and the federal government” for all federal reserved water rights claims. Section 85-2-703, MCA. The Commission has a statutory obligation to negotiate water rights for all federal reservations for which the Federal Government claims federal reserved water rights. It is outside of the Commission’s authority to make a determination on the legitimacy of any particular federal reservation of land. If at some future time the Monument is determined to be an invalid federal reservation or is otherwise dissolved, the compacted water right will likewise be extinguished.